85-624

NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

IRVIN M. CARBALAN

Petitioner

versus

BILL VAUGHN, ET AL

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a municipality liable under 42 U.S.C. § 1983 for a deprivation of rights protected by the Constitution that is inflicted pursuant to the policies of its municipal court judge?

LIST OF INTERESTED PARTIES

(1) Irvin M. Carbalan

(2) City of Buffalo, Texas

(3) Mayor H. L. Burke

(4) Municipal Judge Ben Bagley

(5) City Councilman M. J. Bridges

(6) City Councilman Boyd Reeder

(7) City Councilman Royce Martin

(8) City Councilman Jerry West

(9) City Councilman Charlie Scott

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PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW, IRWIN M. CARBALAN, Petitioner, pursuant to United States Supreme Court Rule 21 and hereby petitions for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit in this cause.

OPINION BELOW

The official reference to the decision of the United States Court of Appeals for the Fifth Circuit is *Carbalan v. Vaughn*, 760 F2d 662 (5th Cir. 1985).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 20, 1985. Petitioner's Motion for Panel Rehearing was denied by the United States Court of Appeals for the Fifth Circuit on June 12, 1985. Pursuant to 28 U.S.C. § 2101(c) and United States Supreme Court Rule 20.4, filing of a Petition for a Writ of Certiorari in this proceeding was due no later than September 10, 1985. However, upon timely application to this Honorable Court, such period for filing was extended to and including October 10, 1985 by Order of Justice White dated September 3, 1985. This Petition for a Writ of Certiorari is filed within the time limits allowed by the extension granted Petitioner by this Honorable Court. The Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES CONSTRUED

This case involves the proper application of 42 U.S.C. § 1983, the full text of which is set forth verbatim beginning at Appendix A - A-1.

STATEMENT OF THE CASE

This is a Petition to the United States Supreme Court requesting issuance of a Writ of Certiorari to review a Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit. Said Judgment and Opinion affirmed the rulings made by the United States District Court for the Western District of Texas which, as the Court of first instance, properly exercised its jurisdiction over this matter by virtue and authority of 28 U.S.C. § 1331 and 1343. The pertinent facts underlying Petitioner's request

for issuance of a Writ of Certiorari from this Honorable Court are set forth as follows:

On March 31, 1980, Petitioner was arrested on a public highway in the City of Buffalo, Texas by City Marshal Bill Vaughn for driving with an expired motor vehicle registration and for failure to appear previously on that charge. The arrest was made under authority of two outstanding warrants issued by Buffalo Municipal Judge Ben Bagley. Upon being brought before Judge Bagley, Petitioner entered a "not guilty" plea as to both offenses and requested admission to bail. Thereafter, Judge Bagley set bail at a total of $407.00 for the two offenses, the maximum amount permitted by Texas law.

Petitioner tendered his personal check in the required amount to Judge Bagley but said check was refused. Petitioner next tendered two motor club with arrest bond endorsements but said cards were also refused by Judge Bagley in direct contravention of Texas law. *See* Tex. Code Crim. Pro. 17.045 (automobile club card containing bail bond certificate shall be accepted as bail bond in an amount not to exceed $200.00 per card). When advised by Judge Bagley that he would not accept the cards under any circumstances, Petitioner telephoned his wife who, thereafter, drove to the courthouse and wrote a personal check for $407.00, finally obtaining Petitioner's release.

Petitioner filed suit on March 23, 1982 against the City of Buffalo, Ben Bagley, individually and as city judge of Buffalo, Texas and Marshal Vaughn, seeking relief pursuant to 42 U.S.C. §§ 1983 and 1988 for infringement of rights protected by the Fifth, Eighth and Fourteenth Amendments to the Constitution. On the day of jury selection the district court granted Judge Bagley's Motion to

Dismiss, finding that he was entitled to absolute immunity. Trial ensued against the City of Buffalo and Marshal Vaughn. At the conclusion of the evidence, the case was submitted to the jury.

The issue of the city's liability was submitted with Petitioner's instructions that city officials allowed Judge Bagley's acts to occur as a de facto policy of the city. The district court did not define "de facto policy" or otherwise explain the elements of municipal liability under *Monell v. Department of Social Services.* Petitioner requested that the court charge the jury that the city's "de facto policy" includes the acts of those whose acts and edicts fairly represent the policy of the City of Buffalo. The court refused this instruction.

In response to special interrogatories, the jury found that Judge Bagley had "denied Plaintiff CARBALAN his right to reasonable bail by refusing to accept the tendered motor club card" but that the city did not have "a policy approving such action. . ." The jury also awarded Petitioner no damages for injuries sustained as a result of the "policies of the City of Buffalo." A take nothing judgment was subsequently entered by the court.

This judgment was appealed to the United States Court of Appeals where it was later affirmed for the reason, *inter alia,* that the appellate court determined that a verdict against the city would have been impermissible as a matter of law. It is from this decision that Petitioner hereby petitions this Honorable Court for review.

REASONS FOR GRANTING CERTIORARI

Petitioner is aware that a review on Writ of

Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. Review is sought in this case because of Petitioner's conviction that the United States Court of Appeals for the Fifth Circuit has decided a federal question
(§ 1983 municipal liability) in a way in conflict with the applicable decisions of this Court, specifically *Monell v. Department of Social Services.*

ARGUMENT

The beginning point for any current discussion of municipal liability under § 1983 is *Monell v. Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The Court in *Monell* held that local government units may be subjected to liability under § 1983 where official policy or governmental custom is responsible for a deprivation of rights protected by the Constitution. In so holding, the court was required to overrule *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L. Ed. 2d 492 (1961), which had determined that municipalities and other local government units were not "persons" within the meaning of § 1983.

After extensively excerpting congressional debates leading up to the passage of the Civil Rights Act of 1871, as well as discussing the historical concerns prompting the need for federal civil rights legislation at that point in the nation's development, the Court held that:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies,

> therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where. . .the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person", by the very terms of the statute, may be sued for Constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels.

Monell, 436 U.S. at 690-91, 98 S.Ct. at 2035-36 (emphasis in original) (footnotes omitted). However, the Court rejected governmental respondeat superior liability under § 1983. On the contrary, the Court concluded that a local government could not be sued for injuries inflicted solely by its employees and agents. The Court provided that "it is [instead] when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government is responsible under § 1983. *Id.* 436 U.S. at 694, 98 S. Ct. at 2037-38. However, in making this general statement in *Monell*, the Court very candidly admitted that it had not addressed what the full contours of municipal liability under § 1983 may be, noting that it had "attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases, and we expressly leave further development of this action to another day." *Monell*, 436 U.S. at 694, 98 S. Ct. at 2038.

Since the time that *Monell* was handed down, the circuit courts have struggled in attempting to define and develop the full contours of § 1983 municipal liability. One of the most recent attempts at this task was undertaken by the Fifth Circuit Court of Appeals in *Bennett v. City of Slidell*, 728 F2d 762 (5th Cir. 1984) (en banc). In *Bennett* the court observed that in *Monell* there was no question but that the objectionable conduct was city policy. The court went on to comment that one of the major questions left unsettled by *Monell* was the identification of "those whose edicts or acts may fairly be said to represent official policy." The Fifth Circuit then directly phrased the question to be resolved; "[w]here the governing body itself does not commit the act or promulgate the policy or countenance the custom, under what circumstances will the conduct or policy or custom of an agent subject the city to liability?" *Bennett*, 728 F2d at 766.

As a matter of legal mechanics, the court initially noted that if a city may be liable only where the injury is inflicted in the execution of city policy, the complainant must identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy. Since, in the majority of cases, the identity of the policy and the injury related to its execution will be a relatively straightforward matter, the Court dealt at length with the facts and circumstances necessary to effectuate the requisite "connection" of the policy to the municipality.

The Court in *Bennett* noted that this connection may be made through two different sources, i.e., through the governing body of the city or through a policymaking official of the city. As to the first connection, the Court remarked that:

> The interference with the rights of the Plaintiff must be due to a violation for which the city government itself is responsible. Usually a council or commission will be the governing body to which responsibility must be attached. The council may violate rights of people by direct orders or by setting a course of action for city employees which, when followed by city employees, interferes with someone's rights. The council may set a course of action by its own promulgation or by the acceptance of a course set or conducted by city employees. In any event the course of conduct, whether formally declared or informally accepted, must be the basis of city liability.

Id. at 767. Besides the duly considered governing body of a city the *Bennett* Court acknowledged that *Monell* expressly stated that city policy, for which the city may suffer liability, may be made by city lawmakers, i.e., "those whose edicts or acts may fairly be said to represent official policy."

In analyzing this phrase, the Fifth Circuit stated its belief that these words did not "declare that any city official's edicts or acts would render the city liable in any case where a fact finder chose to say, speaking fairly, that the edicts or acts would be official policy." *Id.* at 769. In explaining its limited interpretation of this wording, the majority in *Bennett* argued that:

> The [Supreme] Court intended there to be a legal perimeter for city liability, which was not to include responsibility for the edicts or acts of its employees, whatever their rank, unless in accord with city policy. Liability must rest on official policy, meaning the city government's policy and not the policy of an

> individual official. The policy is that of the city, however, where it is made by an official under authority to do so given by the governing authority. Hence culpable policy is attributable to the governing body of the city where the policy was made by an official to whom the governing body had given policymaking authority.

Id. Policymakers, as described in *Bennett,* act in substitution for the governing body in their sphere of responsibility; they are not supervised except as to the totality of their performance. "The governing body retains the prerogative of the purse and final legal control by which it may limit or revoke the authority of the official." *Id.*

Upon Petition for Rehearing of the en banc *Bennett* decision, the judges of the Fifth Circuit were able to unanimously agree upon the following statement:

> A municipality is liable under § 1983 for a deprivation of rights protected by the Constitution or federal laws that is inflicted pursuant to official policy.
>
> Official Policy is:
>
> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policymaking authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly

> represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policymaking authority.

Bennett v. City of Slidell, 735 F2d 861 (5th Cir. 1984)(en banc). However, this statement was not to be construed as the *sine qua non* on the extent of a municipality's potential liability for the acts of its officials for, as acknowledged in the opinion, the Court still continued to affirm its writing in *Familias Unidas v. Briscoe,* 619 F2d 391 (5th Cir. 1980), "as it relates to the officer who obtains policymaking authority by virtue of the office to which that officer is elected." *Bennett v. City of Slidell,* 735 F2d at 862.

In order to fully understand the type of policymaker comprehended by the *Familias Unidas* decision, a brief review of the underlying facts is in order. Familias Unidas, an organization of Mexican-American citizens located in Medina County, Texas, engaged in boycotts of the Hondo Independant School Districts at various times during 1974. At the insistence of the school board, the county judge of Medina County sent a letter to the chairman of Familias Unidas requesting public disclosure of the names of all officers and members of the organization and its usual meeting places, pursuant to Tex. Educ. Code Ann. § 4.28 (Vernon 1972). Hoping to forestall the impending compulsory disclosure, Familias Unidas filed suit against the Medina County Judge and others to have § 4.28 declared unconstitutional. The Fifth Circuit, upon finding § 4.28 unconstitutional and awarding nominal damages to an individual Plaintiff, then asked from whom such award was collectible. In holding that the county judge was not liable for the award, the court found that his compliance with the

school board's request for disclosure did not represent the official policy of Medina County, offering that:

> There are, to be sure, many actions of a county judge that may justifiably be considered to constitute or represent county "policy" under *Monell.* In addition to his judicial duties, a Texas county judge is charged by the state constitution and statutes with the performance of numerous executive, legislative and administrative chores in the day-to-day governance of the county . . . Because of the unique structure of county government in Texas, the Judge --- like other elected county officials, such as the sheriff and treasurer -- holds virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein . . .Thus, at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one "whose edicts or acts may fairly be said to represent official policy" for which the county may be held responsible under § 1983.

Familias Undias, 619 F2d at 404. This type of policymaker blends some of both elements present in the *Bennett* definition of "official policy", i.e., a Texas county judge could be considered as the governing body for the county in certain spheres of responsibility or he could be viewed as the recipient of an implied (by the virtue of his office) delegation of policymaking authority or a combination of both.

Compounding this ambiguity is the apparent fact that this same judicial officer may sometimes act to advance state policy in addition to, or in liew of, county

policy. This circumstance is made evident in *Familias Unidas* by reason of the justification used by the Fifth Circuit to exculpate Medina County from liability for the act of its county judge in enforcing an unconstitutional state law.

> The narrow authority delegated to the county judge in § 4.28, however, bears no relation to his traditional rule in the administration of county government or to the discretionary powers delegated to him by state statute in aid of that role. Instead, his duty in implementing § 4.28, much like that of a county sheriff in enforcing a state law, may more fairly be characterized as the effectuation of the policy of the State of Texas embodied in that statute, for which the citizens of a particular county should not bear singular responsibility.

Id. It was this language that led the panel in this cause to the erroneous conclusion that the improper refusal of Judge Bagley to accept motor club cards as bail was somehow an "effectuation of the policy of the State of Texas . . . for which the citizens of a particular county should not bear singular responsibility." Not only is this conclusion unsupported by the facts of this case, it is also in conflict with a sister holding of the Fifth Circuit.

In *Crane v. State of Texas*, 759 F2d 412 (5th Cir. 1985) the Plaintiff challenged Dallas County's practice of issuing misdemeanor capias without a finding of probable cause by a neutral and detached magistrate. After declaring such a practice unconstitutional under the Fourth Amendment, the court was then called upon to decide if Dallas County was immune from liability for money damages resulting from the unconstitutional practices of

its District Attorney on the theory that such practices were neither done for the county nor subject to its control. In rejecting immunity for Dallas County under these circumstances, the Court observed that the Dallas County District Attorney acted independently of any state official in formulating the accused practices. "To the contrary, the record plainly shows that the District Attorney was alone responsible for the County system and could change it at will." *Id.* at 429.

Quoting language referring to "officers who obtain policymaking authority by virtue of the office to which that officer is elected," *Bennett*, 735 F2d at 862, the court held that the acts of the District Attorney in this case were clearly within the *Familias Unidas* conceptual framework. "His authority to establish County procedures for issuing misdemeanor capias derived from the County office to which he was elected by the County voters. That he has such authority is patent and admitted . . ." *Crane*, 759 F2d at 429-30.

> Thus, because the ultimate authority for determining County capias procedures reposed in the District Attorney, an elected County official, his decisions in that regard must be considered official policy attributable to the County . . . The County in this case acted through the District Attorney; he selected the means by which the county was to achieve a sound and legally sufficient capias system. His choice of an unsound and legally insufficient system represents County policy for which the County is liable.

Id. This holding is a correct interpretation of *Monell* municipal § 1983 liability. The holding in the cause now before this Honorable Court is not.

Judge Bagley was at all relevant times the municipal judge of the City of Buffalo, Texas. That such an office is clothed with *Familias Unidas* policymaking authority cannot seriously be questioned. Under Texas law, in certain cities the mayor is the ex-officio judge of the city's municipal court unless the governing body of the city has, by ordinance, provided for the appointment and qualifications of the judge of the municipal court, or in the alternative, authorized the election of a municipal court judge. *See* Tex. Rev. Civ. Stat. Ann. Art. 1197 and 1197a (Vernon 1963)(full text of statutes in Appendix A).

Judge Bagley was duly appointed as municipal judge of Buffalo in with accordance Art. 1197a and had served in that office for a good number of years. As stated in the Fifth Circuit's opinion, "[b]oth sides agree that the evidence developed at trial showed that Buffalo exercised no control over Judge Bagley's conduct as a municipal judge, and that Judge Bagley had full responsibility for operating the municipal court." *Carbalan*, 760 F2d at 664. These are almost the exact findings made with respect to the Dallas District Attorney in *Crane, supra.* Like the District Attorney, Judge Bagley obtained policymaking authority by virtue of the office which he held. The fact Judge Bagley was, by ordinance, appointed instead of elected ot the office of municipal judge is of no moment. The powers and duties of the office were the same, no matter if the judge was elected or appointed to it.

Much like the District Attorney in *Crane* determined County capias procedures, Judge Bagley also has ultimate authority for determining the City of Buffalo's procedures regarding the type of bail that would be accepted. Much like Dallas County acted through its District Attorney by allowing him to select the means by which the County was to achieve a sound and legally sufficient capias system, the

City of Buffalo acted through Judge Bagley by allowing him to select the means by which the city was to achieve a sound and legally sufficient system for posting bail. And, finally, Judge Bagley's choice of an unsound and legally insufficient practice with respect to the type of bail he would accept represents city policy as did the District Attorney's unsound and legally insufficient capias system.

With respect to the *Carbalan* panel's assertion that the City of Buffalo could not be liable for errors in the exercise of Judge Bagley's judicial duties simply because he held the office of municipal judge, any more than the county in *Familias Unidas* was liable for the judicial acts of a county judge, *Carbalan*, 760 F2d at 665; reference is again made to *Crane*.

As explained in the decision, the district court had found Dallas County immune from liability because the Defendants were effectuating the policy of the State of Texas (enforcing the state criminal law) for which the citizens of a particular county should not bear singular responsibility. *See Crane v. State of Texas*, 534 F. Supp. 1237, 1245 (N. D. Tex. 1982), *citing Familias Unidas*. In rejecting this analysis, the Court said:

> This reading of *Familias Unidas* ignores two crucial distinctions between that case and this. First, the Defendants in *Familias Unidas* complied with a state statutory scheme later found to be unconstitutional; the error was in the scheme not in the Defendants' interpretaion of it. Here Defendants failed to comply with a constitutional statutory scheme; the error was in their interpretation, not in the scheme.

Crane, 759 F2d at 430, n. 19. Here, the error was not the statute regarding bail bond, it was in Judge Bagley's interpretation or ignorance of it. *Familias Unidas* cannot be construed to immunize local governments from § 1983 damage liability for actions within the discretion of their officials which prove to be both unconstitutional and illegal under state law. Judge Bagley connot unconstitutionally deny reasonable bail and expect to hide behind *Familias Unidas* any longer.

Judge Bagley would not be liable to Petitioner for the payment of any money damages found to have resulted from his unconstitutional acts, due to his judicial immunity. *See Pulliam v. Allen*, ___ U.S. ___ , 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984). However, that fact does not prevent the municipality for which he makes policy from being subjected to liability for these same money damages under *Monell* principles. *See Owen v. City of Independence*, 445 U. S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980)(fact that officials of municipality enjoy qualified immunity is not a defense to municipality for its *Monell* liability). *See also Thomas v. Sams*, 734 F2d 185 (5th Cir. 1984)(city liable for money damages resulting from the unlawful acts of its mayor partially performed in his capacity as ex officio judicial officer of city). The *Thomas* case reversed a judgment for the municipality that had been based upon the district court's statement that it was "unwilling to impose liability upon local governments because of the strictly legal actions of their judicial officers." *Id.* at 187.

CONCLUSION

The holding by the Fifth Circuit in this action that the City of Buffalo cannot be liable, as a matter of law, to

Petitioner for the unconstitutional practices of its municipal judge is an egregious departure from the principles of municipal liability laid down by this court in *Monell v. Department of Social Services.* Based upon the arguments and authorities herein set forth, Petitioner respectfully petitions this Honorable Court for a Writ of Certiorari to review and correct the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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By _____
Charles H. Clark

ATTORNEYS FOR PETITIONER
IRVIN M. CARBALAN

CERTIFICATE OF SERVICE

I hereby certify that three (3) true correct copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon Respondents by depositing said Petition in a United States post office, with first class postage prepaid, addressed to Respondents' counsel of record, Mr. W. C. Haley and Mr. Herbert Bristow, Haley & Davis, United Bank Plaza, 510 N. Valley Mills Drive, Waco, Texas 76710.

All parties required to be served have been served.

_____

Charles H. Clark

APPENDIX A

AMENDMENTS TO CONSTITUTION OF UNITED STATES

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offinse to be twice put in jeopardy of life of limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district whrerin the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection to the laws.

FEDERAL CIVIL RIGHTS ACT, 42 U.S.C.

§1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a state of the District of Columbia.

TEXAS CODE OF CRIMINAL PROCEDURE ANNOTATED.

Art. 17.045. Bail bond certificates

A bail bond certificate with respect to which a fidelity and surety company has become surety as provided in

the Automobile Club Services Act, or for any truck and bus association incorporated in this state, when posted by the person whose signature appears thereon. shall be accepted as bail in an amount not to exceed $200 to guarantee the appearance of such person in any court in this state when the person is arrested for violation of any motor vehicle law of this state or ordinance of any municipality in this state, except for the offense of driving while intoxicated or for any felony, and the alleged violation was commited prior to the date of expiration shown on such bail bond certificate.

VERNON'S ANNOTATED TEXAS CIVIL STATUTES

ARTICLE 1197. Judge in other cities.

In cities, towns and villages, not incorporated under specisl charter, the mayor shall be ex-officio recorder of the "corporation court," unless the governing body by ordinance authorize the election of a recorder, in which case a recorder shall be elected in the same manner and for the same time as the mayor is elected. Acts 1899, p.40.

ARTICLE 1197a. Recorder of Corporation Court.

The governing body of any city, town or village not incorporated under special charter nor incorporated under or adopting or amending its charter under Article 11, Section 5, of the Constitution of the State of Texas, commonly known and referred to as the "Home Rule Amendment," may by ordinance provide for the appointment and qualifications of the recorder of the Corporation Court in any such city, town or village.

In any such city, town or village so providing by ordinance for the appointment of the recorder of such Corporation Court and which has not theretofore provided for the election of such reorder in the manner authorized by Article 1197, Revised Civil Statutes of Texas, 1925, the mayor of such city, town or village shall cease to be the ex-officio recorder of such Court upon the enactment of such ordinance and the recorder first appointed shall hold his term of office corresponding to the unexpired term of said mayor, and every two (2) years thereafter a recorder shall be appointed for a term of two (2) years.

In any such city, town or village so providing for the appointment of the recorder of such Corporation Court and which has theretofore provided for the election of such recorder, the recorder first appointed shall be appointed at the expiration of the term of office of the then recorder so elected and shall hold his term of office for two (2) years, and every two (2) years thereafter a recorder shall be appointed for a term of two (2) years.

All recorders of such Corporation Courts in such cities, towns and villages shall hold their terms of office for the term appointed and until their successors have been appointed and qualified. Added Acts 1953, 53rd Leg., p.39, ch.31, §1.

APPENDIX B

Irvin M. CARBALAN,
Plaintiff-Appellant,

v.

Bill VAUGHN, Individually and as Marshal of the City of Buffalo, Texas, et al.,
Defendants-Appellees.

No. 84-1558
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
May 20, 1985.
Rehearing Denied June 12, 1985.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Irvin M. Carbalan filed this civil rights suit against the city of Buffalo, Texas, and its Municipal Judge, Ben Bagley, conplaining that Judge Bagley denied his constitutional right to reasonable bail when he refused to accept two motor club cards in lieu of cash bail.[1] Carbalan convinced a jury that Judge Bagley denied him his right to reasonable bail, but won no relief: before trial the district court, finding that judge Bagley was immune, dismissed all claims against him and the jury found that Buffalo had no policy approving Judge Bagley's bail rulings. Carbalan asserts on appeal (1) that the court abused its discretion in

---

[1]The claims rested on 42 U.S.C. § 1983. Carbalan also sued the city marshal, claiming that he used excessive force in arresting him. The jury found for the marshal and Carbalan does not here quarrel with that decision.

refusing him leave, after trial had begun, to amend his pleadings to seek declaratory and injunctive relief against Judge Bagley, (2) that the court erroneously instructed the jury on Buffalo's potential municipal liability, and (3) that because the jury found a constitutional violation he is a "prevailing" party, entitled to attorneys' fees under 42 U.S.C. § 1988. We affirm because we are persuaded that the court was within its discretion in denying leave to amend the complaint, that the city could not have been liable for Judge Bagley's rulings regardless of the correctness of the jury instructions, and that Carbalan did not prevail.

I

On March 31, 1980, Carbalan was arrested for driving with an expired motor vehicle registration and for failure to appear previously on that charge. The arrests were authorized by warrents issued by Judge Bagley who set bail at a total of $407 for the two offences, the maximun amount permitted by Texas law. Carbalan tendered two motor club cards with arrest bond endorsements. The parties agree, and we assume, that Texas law requires courts to accept such cards as equal to cash bail of up to $200 per card. According to Carbalan's uncontroverted testimony, when Judge Bagley said that he would not accept such cards under any circumstances, Carbalan telephoned his wife, who drove to the courthouse and wrote a personal check for $407, obtaining his release.

[1] Carbalan's original and amended complaints sought only money damages against Judge Bagley and the city. The amended complaint and amended proposed pretrial order were filed the day before the trial began. Neither the pretrial order nor the amended complaint requested any declaratory or injunctive relief. After the jury

had been selected, Carbalan sought leave to amend his complaint to seek declaratory and injunctive relief against Judge Bagley, which the court denied. Carbalan did so presumably because judges are not absolutely immune from suits seeking such relief. *Pullman v. Allen*, ____ U.S. ____ , 104 S. Ct. 1970, 80 L. Ed. 2d. 565 (1984).

Both sides agree that the evidence developed at trial showed that Buffalo exercised no control over Judge Bagley's conduct as a municipal judge, and that Judge Bagley had full responsibility for operating the municipal court. There was no evidence that any city official approved or was aware of Judge Bagley's "practice" of not accepting motor club cards. Indeed, the evidence of "practice" was the judge's statement that he would not take them under any circumstances. There was no other evidence that the issue was a recurring one.

The court submitted the issue of the city's liability to the jury, with instructions that Carbalan asserted that city officials allowed Judge Bagley's acts "to occur as a de facto policy of the city," and that the defendants "denied that any such de facto policy existed." The court did not define "de facto policy" or otherwise explain the elements of municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L. Ed. 2d 611 (1978). Carbalan requested that the court charge the jury that the city's "de facto policy" includes "the acts of those whose acts and edicts fairly represent the policy of the City of Buffalo." The court refused.

In response to special interrogatories, the jury found that Judge Bagley had "denied Plaintiff Carbalan his right to reasonable bail by refusing to accept the tendered motor club cards," but that the city did not have "a policy

approving such action . . . ." The jury, asked what sum of money would compensate Carbalan for damages sustained for the "policies of the City of Buffalo," answered "None." The court then entered a judgement that Carbalan take nothing. Finding that Carbalan had not "prevailed," it refused to award attorneys' fees under 42 U.S.C. § 1988.

II

[2] Carbalan, citing the statement in Federal Rule of Civil Procedure 15(a) that leave to amend a complaint "shall be freely given when justice so requires," asks us to reverse the district court's denial of leave to amend his complaint to add claims for declaratory and injunctive relief against Judge Bagley. We can do so only if the court below abused its discretion. *Bamm, Inc. v. GAF Corp.*, 651 F.2d 389, 391 (5th Cir. 1981); *Zenith Radio Corp. v. Hazeltine research, Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 802, 28 L. Ed. 2d 77 (1971). A court's exercise of discretion to deny leave to amend is informed by "undue delay" and "undue prejudice to the opposing party." *Forman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L. Ed. 2d 222 (1962).

[3] Given the board reach of judicial immunity the rejected amendment attempting, as it did, to slip past immunity and expose the judge to the threat of attorneys' fees presented a significant shift. As the case had long been framed, Judge Bagley's immunity defense was virtually certain and his expectation of dismissal at the outset of trial was justifiable; it is reasonable to infer that this expectation affected his trial preparation, a reality that while not lifted up on the record, was doubtlessly apparent to the trial judge. We cannot conclude that the district court abused its discretion in taking into account the lulling of Judge Bagley even though there is no suggestion that it

was other than the product of oversight or inadvertence. Similary, the court was within its discretion in denying leave to amend requested during the trial. *See Daves v. Payless Cashways, Inc.*, 661 F.2d 1022, 1024-25 (5th Cir. 1981) (approving denial of leave to amend on similar facts).

[4] Nor can Carbalan rely on Rule 15(b), which allows amendments to pleadings to conform to the evidence presented at trial. Rule 15(b) deals only with issues "tried by express or implied consent of the parties." Judge Bagley did not consent to trial of any claims against him for declaratory or injunctive relief; he successfully moved to be dismissed entirely as a defendant. The trial record reflects no discussion or argument concerning any claims for declaratory or injunctive relief.

[5] Finally, we cannot agree with Carbalan that his general prayer for "such other and further relief . . . to which plaintiff may be entitled" constituted a demand for declaratory and injunctive relief in the face of his proposed pretrial order in which he sought only damages.

III

Carbalan argues that the district court erred in its charge on municipal liability; that in any event, the jury's finding that Buffalo had no policy approving Judge Bagley's acts was against the great weight of the evidence. We need not reach Carbalan's complaints about the jury instructions, because on the facts adduced at trial, Buffalo was not liable for judge Bagley's acts as a matter of law.

The parties agree that Buffalo city officials exercised no control over the municipal court's operations, and gave no guidance or instructions to Judge Bagley. Yet, Carbalan

argues that Judge Bagley was, or the jury could have so concluded, a policy-making official of the city, "whose edicts or acts may fairly be said to represent official policy," *Monell*, 436 U.S. at 694, 98 S Ct. at 2037, and that the city is therefore responsible in damages for any constitutional violation committed by Judge Bagley. The argument relies on *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir.1980), in which we stated that in some areas of responsibility, county judges in Texas are "the final authority or ultimate repository of county power," and that counties can be held responsible for county judges' acts in those fields.

Carbalan, however, ignores a crucial distinction made in *Familias Unidas*. In Texas, county judges perform "numerous executive, legislative, and administrative chores," and in doing so can shape county policy. *Id.* at 404. Their judicial function, though, "may more fairly be characterized as the effectuation of the policy of the State of Texas. . .for which the citizens of a particular county should not bear singular responsibility." *Id.* Indeed, the specific holding of *Familias Unidas* was that a county was *not* liable under *Monell* for a county judge's enforcement of an unconstitutional state statute.

[6] The city of Buffalo had no policy regarding Judge Bagley's judicial duties. If Judge Bagley erred in their exercise, the city is not liable simply because Judge Bagley held the office of municipal judge, any more than the county in *Familias Unidas* was liable for the judicial acts of a county judge. The urged reading would subvert the message of *Monell* that municipalities cannot be vicariously liable under § 1983. *See Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir.1984) (en banc.)

On these facts, the district court would have been justified in granting a directed verdict for the city of Buffalo, and was a *fortiori* correct in denying Carbalan's motion for new trial. Because a verdict for Carbalan against the city would have been impermissible as a matter of law, any error in the jury charge on municipal liability was harmless. *Lyle v. R.N. Adams Construction Co.*, 402 F.2d 323 (5th Cir.1968).

[7] Finally, Carbalan argues that because the jury agreed that the refusal of the motor club cards was a constitutional deprivation, he "prevailed" within the meaning of 42 U.S.C. § 1988, and should have been awarded attorneys' fees. To prevail, though, a plaintiff must obtain "the primary relief sought." *Taylor v. Sterrett*, 640 F.2d 663, 669 (5th Cir.1981). Carbalan has won no relief against anyone, and is not entitled to attorneys' fees. *Robinson v. Kimbrough*, 652 F.2d 458, 466 (5th Cir.1981) (plaintiffs cannot recover attorneys' fees "for the pursuit of claims on which they obtained no relief, judicial or otherwise.").

The judgment of the district court is AFFIRMED.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

No. 84 1558

IRVIN M. CARBALAN,
Plaintiff-Appellant,

versus

BILL VAUGHN, Individually and as
Marshall of the City of Buffalo, TX, ET AL.,
Defendants-Appellees.

FILED
June 12, 1985
Clerk

Appeal from the United States District Court for the
Western District of Texas

ON PETITION FOR REHEARING

(June 12, 1985)

Before REAVLEY, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *DENIED.*

entered for the court;

/s/_____
United States Circuit Judge

APPENDIX "D"

SUPREME COURT OF THE UNITED STATES

No. A-167

IRVIN M. CARBALAN,

Applicant,

v.

BILL VAUGHAN, MARSHAL, CITY OF BUFFALO, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(X),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 10, 1985.

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 3rd
day of September, 1985.

Supreme Court, U.S.
FILED
NOV 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-624

In the Supreme Court of the United States

OCTOBER TERM, 1985

IRVIN M. CARBALAN

Petitioner

versus

BILL VAUGHN, ET AL

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

IRVIN M. CARBALAN	*	
	*	
VS.	*	
	*	
BILL VAUGHN,	*	CIVIL ACTION
INDIVIDUALLY, AND AS	*	NO. W-82-CA64
MARSHALL OF THE CITY OF	*	
BUFFALO, TEXAS, BEN	*	
BAGLEY, INDIVIDUALLY,	*	
AND AS JUDGE OF THE	*	
CITY OF BUFFALO, TEXAS,	*	
AND THE CITY OF	*	
BUFFALO, TEXAS	*	

FILED FEB. 3, 1984

FINAL JUDGEMENT

Came on the 16th day of January, 1984, the above numbered and styled cause for trial and all parties having announced ready, a good and lawful jury was duly impaneled, selected and sworn, whereupon the case proceeded to trial before said jury, and the jury, after having heard the evidence, stipulations, and argument of counsel, on the 19th day of January, 1984 returned their verdict into open court, which verdict was duly received by the court and the jury discharged, said verdict being as follows:

"1. Do you find that excessive force was used against Plaintiff Irvin M. Carbalan by defendant Bill Vaughn on or

about March 31, 1980, so as to deprive him of his constitutional rights?

Answer Yes or No.
Answer: *"NO"*

If you have answered Question No. 1, "Yes", answer Questions numbered 2 and 3; otherwise go to Question No. 4.

2. Do you find that the city of Buffalo, Texas had a policy approving such deprivation of constitutional rights, if you have so found?

Answer Yes or No.
Answer: _____

3. Do you find that Plaintiff Carbalan's arrest by Defendant Vaughn was conducted in good faith?

Answer Yes or No.
Answer: _____

4. Do you find that Judge Ben Bagley denied Plaintiff Carbalan his right to reasonable bail by refusing to accept the tendered motor club cards?

Answer Yes or No.
Answer: *YES"*

If you have answered Question No. 4 "Yes", answer Question No. 5.; otherwise fo the Question No. 6.

5. Do you find that the city of Buffalo, Texas had a policy approving such action of judge Ben Bagley, if you have so found?

Answer Yes or No.
Answer: *"No"*

6. Do you find that Judge Ben Bagley denied Plaintiff Carbalan his right to reasonable bail by setting bail in an unreasonable amount?

Answer Yes or No.
Answer: *"NO"*

If you have answered Question No. 6 "Yes", answer Question No. 7; otherwise go to Question No. 8.

7. Do you find that the city of Buffalo, Texas had a policy approving such action of Judge Ben Bagley, if you have so found?

Answer Yes or No.
Answer: _____

8. What sum of money, if paid now in cash, do you find would adequately compensate Plaintiff for the actual damages he has sustained, if any, as a result of the conduct of Bill Vaughn or the policies of the city of Buffalo?

Answer in dollars and cents, or "none".
Use of excessive force *NONE*
Unreasonable bail *NONE*
Failure to accept motor club cards *NONE*

9. What sum of money, if any, do you assess as punitive damages against Defendant Bill Vaughn?

Answer in dollars and cents, or "none".
Answer: *NONE* "

And the Court, after having considered the pleadings, evidence, stipulations, and jury verdict is of the opinion that judgement should be entered that Plaintiff take nothing by his suit;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff take nothing against any and all Defendants and all costs of suit are here adjudged against the Plaintiff, Irvin M. Carbalan, for which let process of this court issue for the enforcement thereof.

AND IT FURTHER appearing to the Court and the Court finds that Plaintiff has not "prevailed" in this suit, it is ORDERED, ADJUDGED, AND DECREED hereby that neither Plaintiff nor his attorneys are entitled to attorneys' fees, and it is ORDERED that they take nothing against the Defendants or any of them for attorneys' fees.

ENTERED this 3rd day of February, 1984.

/S/ Walter S. Smith, Jr.

U. S. Magistrate

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Supplemental Appendix to the Petition for Writ of Certiorari have been served upon Respondents by depositing same Supplemental Appendix in a United States post office, with first class postage prepaid, addressed to Respondents' counsel of record, Mr. W. C. Haley and Mr. Herbert Bristow, Haley & Davis, United Bank Plaza, 510 N. Valley Mills Drive, Waco, Texas 76710.

All parties required to be served have been served.

_____

Charles H. Clark

85-624 (3)

No. 85-264

Supreme Court, U.S.
FILED
NOV 8 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

IRVIN M. CARBALAN,

Petitioner,

versus

BILL VAUGHN, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Honorable Court should deny Petitioner's application for Writ of Certiorari because:

(1) The question presented by Petitioner has been disposed of by the trial court and 5th Circuit Court on procedural grounds and is not preserved by Petitioner.

(2) City Judge Bagley's judicial acts should not be imputed to the City of Buffalo under the theory that such acts and edicts fairly represent the policy of the City of Buffalo.

(3) Petitioner failed to discharge his burden of proving and obtaining a finding that Judge Bagley's refusal to accept auto club membership cards as bail, was of sufficient gravity to constitute a constitutional deprivation under 42 U.S.C. Sec. 1983.

LIST OF INTERESTED PARTIES

(1) Irvin M. Carbalan, Petitioner,
Buffalo, Texas 75833

(2) City of Buffalo, Texas, Respondent
Buffalo, Texas 75833

(3) Mayor H. L. Burke
Mayor of City of Buffalo
Buffalo, Texas 75833

(4) Judge Ben Bagley (Deceased)
Municipal Judge of
City of Buffalo, Texas

(5) Haley & Davis, P.C.
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STATEMENT OF JURISDICTION

Respondents agree that this Honorable Court has jurisdiction.

———o———

STATUTES CONSTRUED

42 U.S.C. Sec. 1983

42 U.S.C. Sec. 1988

Rule 51, Federal Rules of Civil Procedure

———o———

STATEMENT OF THE CASE

The statement of the Petitioner is correct, except his statement that, "Petitioner requested that the court charge the jury that the City's defacto policy includes the acts of those whose acts and edicts fairly represent the policy of the City of Buffalo. The court refused this instruction," which statement is denied. (See analysis of record in body of brief.)

The court of appeals affirmed on other grounds and added that a verdict against the City would have been impermissible as a matter of law. Respondent says the court of appeals was correct on all counts.

———o———

Reason 1 Why The Application For Certiorari Should Be Denied

Restated

The question presented by Petitioner has been disposed of by the trial court and 5th Circuit Court on procedural grounds and is not preserved by Petitioner.

ARGUMENT UNDER #1

The point raised by Petitioners here was not reached in the trial court because of procedural matters. Petitioners did not raise the question of the City's liability because of the "acts of those whose acts and edicts fairly represent the policy of the City of Buffalo" until the day of trial, by amended petition filed on that day. The court refused for filing portions of the amended petition. The record is unclear whether or not this part of the amended pleading was permitted or not. This petition also alleged that the City of Buffalo was ". . . liable pursuant to a defacto policy of the City of Buffalo. . . ." As stated in Petitioner's application for writ "the issue of the City's liability was submitted with Petitioner's instruction. . . ."

The court submitted the following issue:

> "Do you find that the City of Buffalo, Texas, had a policy approving such action of Judge Ben Bagley, if you have so found" to which the jury answered 'no'."

Petitioner did not request any other form of submission of the City's liability, did not suggest a correct instruction and did not object specifically to the court's submission of this issue.

The court's charge was as follows: ". . . Plaintiff's claims are basically as follows: . . . to allow him a drink of water or wash his face and that Defendant Vaughn's alleged acts were due to a defacto policy of the City of Buffalo, Texas. . . ." (R. Vol. V, P. 377, Line 16 to Page 378, Line 3) *Plaintiff's objection to this charge* was that following the words ". . . defacto policy of the City of Buffalo, Texas, that the court should have added the words 'or such refusal was due to acts of those whose acts and edicts fairly represent the policy of the City of Buffalo.' "

Again the *court's charge was*: Plaintiff's claims are basically, "Second, that on or about March 31, 1980, Plaintiff Carbalan was denied his constitutional right to reasonable bail and unreasonably detained in custody by Judge Ben Bagley's refusal to honor the motor club cards tendered by Carbalan in lieu of cash bond, and setting bail in an unreasonable amount, and that these acts were due to a defacto policy of the City of Buffalo, Texas." (R. Vol. V, P. 378, Line 5 through line 11) *Plaintiff objected* and suggested that there be added to that "or as a result of the acts of those whose acts and edicts fairly represent the City of Buffalo."

Again the court's charge was: "*Regarding Plaintiff's claims*, he asserts that the City of Buffalo, Texas is liable because its mayor and city council allowed such constitutional violations as alleged by Plaintiff to occur as a defacto policy of the city." *Plaintiff's objections suggest* that there should be added to the above, "or as a result of the acts of those whose acts and edicts fairly represent the policy of the City of Buffalo." (R. Vol. V, P. 381, line 5 through line 9)

It is seen from an examination of Plaintiff's objections to the charge as set out in the above statement that his suggested changes in the charge concerned only those portions of the charge dealing with the court's preliminary statement to the jury about what the parties were claiming. At no time did the Plaintiff's objections request the court to state to the jury, as a matter of law, that "official municipal policy could be established by the 'acts of those whose acts and edicts fairly represent official policy.'" Plaintiff's objections only suggested that the court change his language or rather add to his language when the court was explaining to the jury *what the Plaintiff claimed.*

It was completely immaterial whether or not the court stated exactly what Plaintiff claimed. If the court had made some error in stating to the jury the substantive law, that would have been one thing, although the statement requested by the Plaintiff probably does not correctly reflect the true substantive law in this case. It is an entirely different matter to call upon the court to add something to what the court states concerning Plaintiff's contentions. This in no way could mislead the jury. The jury, of course, is bound by what the judge tells them about the law, but certainly the jury is not bound and should not be influenced by what the Plaintiff or Defendants claim.

At no time did the Plaintiff request the court to charge the jury, as a matter of law, that municipal policy could be established by the acts of those whose acts and edicts fairly represent official policy. Plaintiff pled: "The actions of Defendants, Bill Vaughn and Ben Bagley, resulted from and were taken pursuant to a defacto policy of the

City of Buffalo, Texas, which is implemented by the City Marshall and City Judge of the City to summarily punish persons who refuse to obey police orders . . .'' (R. Vol. I, Page 150)

So, the court's instruction to the jury as to what Plaintiff claimed was exactly in the terms of Plaintiff's pleadings and the judge was not obliged, in telling the jury what Plaintiff claimed, to add the very questionable words requested by Plaintiff in his objection to the charge.

Rule 51 of the *Federal Rules of Civil Procedure* specifically requires that in order for a party to assign error to the failure to give an instruction, that he must properly and specifically object to the instructions, stating distinctly the matter to which he objects and the grounds for his objection. Failure to object to the court's refusal to give proposed instructions precludes review of the issue. *Ezell v. Mobile Housing Bd.*, 709 F.2d 1376 (5th Cir. 1983). When an issue is not requested in the proper form to the trial court, any error is waived. *Savoie v. Otto Candies, Inc.*, 692 F.2d 363 (5th Cir. 1982). His objections can be entertained now only if the trial court made a grave error leading to a miscarriage of justice. *Henderson v. U.S. Fidelity and Guaranty Co.*, 693 F.2d 1196 (5th Cir. 1982); *Meyers v. Moody*, 693 F.2d 1196 (5th Cir. 1982).

Rule 51 of the *Federal Rules of Civil Procedure* requires that an objection be sufficiently specific to bring into focus the precise nature of the alleged error. *Wilson v. Crosshines Co.*, 556 F.2d 870, 875 (8th Cir. 1977) cert. denied, 434 U.S. 968, 98 S.Ct. 513, 54 L.Ed.2d 455 (1977), quoting *Palmer v. Hoffman*, 318 U.S. 109, 199, 63 S.Ct.

477, 487, 87 L.Ed. 645 (1943). The purpose of Rule 51 is to compel litigants to afford the trial court an opportunity to correct any error in the instructions and to prevent the losing party from obtaining a new trial through relying on a possible error in the original trial. *Lange v. Schultz,* 627 F.2d 122, 128 (8th Cir.1980). *Johnson v. Houser,* 704 F.2d 1049 (8th Cir. 1983). The mere tender of an alternative instruction without objecting to some specific error in the trial court's charge to explaining why the proper instruction better states the law does not preserve the error for appeal. *United States v. Hecht,* 705 F.2d 976, 82-1842 (8th Cir. 1983); *United States v. Parisien,* 574 F.2d 974, 976 (8th Cir.), cert. denied, 439 U.S. 850, 99 S.Ct. 154, 58 L.Ed.2d 154 (1978); *United States v. Phillips,* 522 F.2d 388, 391 (8th Cir. 1975). Error in the instructions not properly objected to is waived unless the error is plain error in the sense that a miscarriage of justice would otherwise result. The plain error exception is narrow and confined to the exceptional case in which error has affected seriously the fairness, integrity or public reputation of judicial proceedings. *Rowe International, Inc. v. J/B Enterprises, Inc.,* 647 F.2d 830, 835 (8th Cir. 1981); *Wright v. Farmers Co-op,* 620 F.2d 694 (8th Cir. 1980); *Henderson v. U. S. Fidelity and Guaranty Co., supra; Meyers v. Moody, supra.*

It is very doubtful that the requested addition to the charge made in Plaintiff's objections to the charge state the correct law on the subject as applied to this case; certainly it does not state all of the law concerning municipalities' liability under 42 U.S.C. Sec. 1983. The court was under no obligation to give a definition of "defacto policy" unless the Plaintiff submitted the correct defini-

tion of such term and if the court had attempted to give a definition of defacto policy of the City of Buffalo, he would have been obliged to give a complete definition and instruction concerning the law as delineated in *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) and its progeny. For instance, he would have been required to tell the jury that a municipality is not liable for the acts of its subordinates or employees on the basis of respondeat superior, because that is a distinction which would not have been rendered the municipality liable, and so on.

In evaluating Plaintiff's complaint concerning the court's instructions, we must not only look at Plaintiff's objection or failure to properly object, but also evaluate the end result. Even if there were error here, it would be harmless error when reviewing the instructions as a whole. The court's charge fairly presented the issue to the jury. Plaintiff therefore has no valid complaint as stated in *Caughlin v. Capitol Cement Co.,* 571 F.2d 290 (5th Cir. 1978) at 300:

> In reviewing a district court's instructions to the jury, we consider the charge as a whole in view of the allegations of the complaint, the evidence presented and the arguments of counsel to determine whether the jury was misled and whether it understood the issues presented. *First Virginia Bankshares v. Benson,* 559 F.2d 1307, 1316 (5th Cir. 1977); *Richardson v. McClung,* 559 F.2d 395, 397 (5th Cir. 1977) (per curiam); *Kyzar v. Valedori Doce Novegacai, S.A.,* 464 F.2d 285, 289 (5th Cir. 1972), cert. denied, 410 U.S. 929, 93 S.Ct. 1367, 35 L.Ed.2d 591 (1973). It is axiomatic that the court need not couch its charge in the precise language and form fancied by a litigant's attorney. *Reyes v. Wyeth Laboratories,* 498 F.2d 1264, 1289 (5th Cir.), cert. denied, 419 U.S. 1096, 95 S.Ct. 687,

> 42 L.Ed.2d 688 (1974); *Andry v. Farrell Lines, Inc.*, 478 F.2d 758, 759 (5th Cir. 1973); *Delancey v. Motichek Towing Service, Inc.*, 427 F.2d 897, 902 F.2d 347 (5th Cir. 1977), '(t)he test is not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues.' *Id.* at 348-49, quoting *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1100 (5th Cir. 1973) . . .

What the Plaintiff did was suggest to the court that when the court was telling the jury what the Plaintiff complained of, he should have added that the Plaintiff also contended liability would result from the "acts of those whose acts or edicts fairly represent the policy" of the City of Buffalo.

In any event, the court's charge: *"Did the City of Buffalo have a policy approving such action of Judge Ben Bagley,"* was broad enough to encompass such claimed *"acts of those whose acts and edicts fairly represent the policy of the City of Buffalo."*

On Petitioner's demand for a jury, the very question here presented was submitted to the jury by the court's Petitioners received an unfavorable jury verdict, which should end his contention.

Petitioner has not preserved his "question presented" for review.

Reason 2 Why The Application For Certiorari Should Be Denied

Restated

City Judge Bagley's judicial acts should not be imputed to the City of Buffalo under the theory that such acts and edicts fairly represent the policy of the City of Buffalo.

ARGUMENT UNDER #2

The trial court resolved the question of the liability of the City of Buffalo for the acts of Judge Bagley by submitting such question to the jury, as set out above. The City should also be held not liable for the same reasons that the Judge was dismissed from the suit; that is because of the nature of the judicial immunity doctrine.

The Fifth Circuit in this case correctly held that "Buffalo was not liable for Judge Bagley's acts as a matter of law."

No case has been cited by Petitioner that holds that a Judge's judicial acts give rise to liability on the political subdivision, within the framework of which he operates.

He cites the case of *Crane v. State of Texas,* 759 F.2d 412, App. for Cert. Pending, which case holds the county of Dallas liable for a policy of the District Attorney in filing misdemeanor complaints without a prior finding by a magistrate of probable cause. It is thought that this holding is incorrect concerning the prosecutional immunity of the District Attorney; however, this holding falls far short of being authority for holding the City of Buffalo liable for the judicial acts of Judge Bagley concerning bond in this case.

It is not clear whether the District Attorney's long-standing policy in *Crane* was considered to be an administrative policy or a judicial policy. There is no question about Judge Bagley's decision. All parties agree that Judge Bagley, himself, was entitled to judicial immunity, for a judicial act.

There is a vast difference between official administrative decisions and official judicial decisions.

The case of *Butz v. Economou,* 98 S.Ct. 2894, 438 U.S. 478, 57 L.Ed.2d 895 (1872) clearly defines this difference. This was suit against the Department of Agriculture and a number of its officials, including federal hearing examiner. *Economou* holds administrative officials have only qualified immunity to suits but federal hearing examiner, because his duties are judicial, has absolute judicial immunity. This honorable court in *Economou* says:

> "in *Bradley v. Fisher,* 13 Wall 335, 20 L.Ed. 646 (1872), the court analyzed the need for absolute immunity to protect judges from lawsuits claiming their decisions had been tainted by improper motives. The court began by noting that the principle of immunity for acts done by judges 'in the exercise of their judicial functions' had been 'the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country.' 13 Wall., at 347. The court explained that the value of this rule was proved by experience. Judges were often called to decide '[c]ontroversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings.' id. at 348. Such adjudications invariably produced at least one losing party, who would 'accep[t] anything but the soundness of the decision in explanation of the action of the judge.'

Ibid. 'Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge.' Ibid. If a civil action could be maintained against a judge by virtue of an allegation of malice, judges would lose 'that independence without which no judiciary can either be respectable or useful.' Id., at 347. Thus, judges were held to be immune from civil suit 'for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction.'" Id., at 354. (98 S.Ct. 2912)

Again, this court in *Economou* says:

"The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the *Bradley* court suggested, 13 Wall., at 348-49, controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See *Pierson v. Ray,* 386 U.S., at 554, 87 S.Ct., at 1217. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation. (98 S.Ct. 2913)

In the case *Sellers v. Procunier,* 9th Cir., 641 F.2d 1295 (1981), that court also clearly enunciates the rationale of judicial immunity as follows:

"The cases granting absolute immunity to judges recognize that extraordinary reasons are required to justify the drastic step of barring the genuinely wronged individual from any redress against the wrongdoer. The Supreme Court has thus enunciated several policy reasons for striking the balance in these cases in favor of completely shielding the judge from

suits under § 1983. The judge is in a unique posture in the adversary system. His or her sole task is to make impartial decisions in vigorously contested actions, to 'decide "[c]ontroversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings".' *Butz v. Economou,* 438 U.S. at 509, 98 S.Ct. at 2912 quoting *Bradley v. Fisher,* 80 U.S. (13 Wall) 335, 348, 20 L.Ed. 646 (1872). The threat of constant litigation against the decision-maker instituted by disappointed litigants is apparent: it cannot be gainsaid that '[t]he loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus.' *Butz v. Economou,* 438 U.S. at 512, 98 S.Ct. at 2913. Judges 'should not have to fear that unsatisfied litigants may hound [them] with litigation charging malice or corruption.'" *Pierson v. Ray,* 386 U.S. at 554, 87 S. Ct. at 1217.

"Thus, the proper functioning and indeed the very survival of any independent, dispute-resolving system requires that the dread of subsequent lawsuits be prevented from becoming a factor in a judge's assessment of the merits of a case. Moreover, the judge's time which would be diverted to contesting such litigation could severely constrict the time available for the performance of his or her primary duties. Absolute immunity, as the Supreme Court has acknowledged, leaves the genuinely wronged person without civil redress. However, broader societal concerns dictate that the balance be struck in favor of freeing judges from the constant fear of retaliatory suits. The alternative of qualified immunity, or no immunity at all, would disserve the public interest, because these officials would still be subject in some degree to vexatious litigation."

The novel policy suggested by Petitioners that Judge Bagley is a policy making official to the extent that the City is liable for the wrongful judicial decisions of Judge Bagley, flies directly in the face of the reasons for judicial

immunity and so erodes such judicial immunity as to totally emasculate it.

If Judge Bagley were faced with casting possible liability upon the City of Buffalo, each time he was called upon to make a judicial decision, he would be "constantly in fear that" unsatisfied litigants may hound [them] with litigation charging malice or corruption" (*Sellers,* Page 1299) and would be in "constant fear of retalitory suits." (*Sellers,* Page 1300)

Based upon the same reason for judicial immunity, the political subdivision, within the frame work of which the Judge operates, should not be held liable for the immune acts of the Judge. Such exposure certainly puts the Judge under the same restraints to independence as his own liability for such acts.

Upon the merits of Petitioner's "question presented" he should fail.

Reason 3 Why The Application For Certiorari Should Be Denied

Restated

Petitioner failed to discharge his burden of proving and obtaining a finding that Judge Bagley's refusal to accept auto club membership cards as bail, was of sufficient gravity to constitute a constitutional deprivation under 42 U.S.C. Sec. 1983.

ARGUMENT UNDER #3

The failure of Judge Bagley to accept two auto club cards, each with limits of $200.00 for a bond set at $407.00 may have been a violation of the Texas Statute, as apparently found by the jury but the violation of a state statute may or may not constitute a constitutional deprivation, under 42 U.S.C. Sec. 1983. *Pennhurst v. State,* — U.S. —, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984); *Holmes v. Wampler, M.D.,* 546 F.Supp. 500, 502 (E.D. Va. 1982); *Smith v. Spina,* 477 F.2d 1140, 1143 (3rd Cir. 1973); *Patricia B. v. Jones,* 454 F.Supp. 18, 21 (W.D. Pa. 1978); *Gonyaw v. Gray,* 361 F.Supp. 366, 368 (D. Vt. 1973).

It is presumed that the trial court interpreted the jury's answer to special issue #4 to be a finding that Judge Bagley violated a state statute but such action did not constitute a constitutional deprivation. Such presumed finding would support his judgment of no recovery by Petitioner. Certainly the slight inconvenience (having to wait 20 or 30 minutes in the court room until his wife arrived to make bail) occasioned Petitioner, by Judge Bagley's refusal to accept the auto club cards together with the jury's findings of no damages, supports the trial court's judgment that the acts of Judge Bagley did not rise to the gravity of a constitutional deprivation.

So Petitioner's completely unsupported assumption that Judge Bagley's refusal to accept Petitioner's auto club cards, rises to the dignity of a constitutional deprivation, is in the face of the findings of the trial court and the court of appeals. Petitioner's further assumption that this one isolated act of Judge Bagley, is sufficient upon which to base a finding of municipal policy of the City of Buffalo is contrary to this Honorable Court's decision in the case of *City of Oklahoma v. Tuttle,* 471 U.S. —, 105 S.Ct. —, 85 L.Ed.2d 791, 53 U.S.L.W. 4639 (No. 83-1919, decided June 3, 1985). Holding that a single incident of excessive force not sufficient proof of a *Monell* municipal policy.

Petitioner did not prove and obtain a finding of a constitutional deprivation; consequently, his "question presented":

> "Is a municipality liable under 42 U.S.C. Sec. 1983, for a deprivation of rights protected by the constitution that is inflicted pursuant to the policies of its municipal court judge."

has no basis in the record for this Honorable Court's consideration.

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CONCLUSION

It is clear from Petitioner's brief in the Court of Appeals that his only concern is to salvage from this trial, attorney's fees under 42 U.S.C. Sec. 1988. As held by the trial court and affirmed by the Court of Appeals, he did not "prevail". Respondent respectfully prays that his application for certiorari be in all things denied.

Respectfully submitted,

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